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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 690

BALTIMORE BUILDING AND CONSTRUCTION TRADES COUNCIL,

Petitioner,

v.

SELBY-BATTERSBY AND COMPANY AND ASSOCIATED BUILDERS AND CONTRACTORS OF MARYLAND, INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your Petitioner, The Baltimore Building and Construction Trades Council, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit, rendered on the 12th day of September, 1958, which decision reversed a decision and order of the National Labor Relations Board dismissing the Respondents' complaint on the merits.

OPINIONS BELOW

The opinion of the National Labor Relations Board is reported in 117 N.L.R.B. No. 366, and appears in this record in Petitioners' Appendix (below) at App. 37.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 259 F. 2d 151, a copy of which is included herein in accordance with the Rules of the court.

JURISDICTION

As noted above, the decree here sought to be reviewed was entered on the 12th day of September, 1958. Upon application of counsel for the present petitioners, an order extending the time within which to file a petition for the writ of certiorari to and including February 9, 1959 was issued by this Court.

The jurisdiction of the Court to entertain the petition for certiorari is conferred by 28 U.S.C.A., Sec. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals commit reversible error, in violation of the purpose and intent of Section 10(f), National Labor Relations Act, as amended, in making findings of fact contrary to those found by the Board, as to the petitioner's participation in unfair labor practices alleged, where such findings of the Board were supported by substantial evidence on the record considered as a whole?

2. Did the Court of Appeals commit reversible error in violation of the purpose and intent of Section 10(b), National Labor Relations Act, as amended, in predicating

essential findings of fact upon evidence of alleged unfair labor practices, in which petitioner was a participant, where such alleged unfair labor practices had occurred more than six months prior to the filing of the charges at bar?

3. Did the Court of Appeals commit reversible error, contrary to established law and settled authority, in holding the petitioner legally responsible, as a vicarious participant, for the alleged unfair labor practices upon the theory that the petitioner instigated the course of conduct declared unlawful?

STATUTES INVOLVED

Labor-Management Relations Act, 1947, as amended, sections 10(b) and 10(f); Public Law No. 101, Eightieth Congress, Ch. 120 as amended by Public Law No. 189, Eighty-Second Congress, and Public Law 85-791, Eighty-Fifth Congress, 29 U.S.C.A. 141-168 (Infra, App. 1).

STATEMENT OF THE CASE

This case is before this Honorable Court upon the petition for the writ of certiorari by the Baltimore Building and Construction Trades Council, pursuant to 28 U.S.C.A. Section 1254(1), to review the decision of the United States Court of Appeals for the Fourth Circuit wherein that court reversed a decision and order of the National Labor Relations Board dismissing a complaint filed against the petitioner and others, charging violations of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.A., Sec. 151, et. seq. hereinafter called the Act).

Specifically, pursuant to the provisions of section 160 of the Act (29 U.S.C.A. 160), charges were filed with the National Labor Relations Board (hereinafter the "Board")

by Selby-Battersby and Company and the Associated Builders and Contractors of America, alleging violations of Sections 8(b) (1) (A), (2), (3) and (4) (A) and (4) (B) of the Act,[1] which provisions proscribe certain conduct as unfair labor practices.

Jointly charged with the petitioner were several other labor organizations,[2] but in the course of the hearing before the Board all of the original respondents, except the present petitioner, entered into a settlement stipulation by the terms of which the proceeding against them was terminated. The Baltimore Building and Construction Trades Council, the petitioner, (hereinafter the Council) defended the charges against it, and after the hearing, the trial examiner issued an intermediate report which found that the Council had violated Sections 8(b), (1) (A), (2) and (4) (A) of the Act. However, the Board held unanimously that the evidence would not sustain the conclusion that the Council was legally responsible for any of the alleged violations of the Act, and accordingly dismissed the complaint.

Pursuant to the provisions of Section 10(f) of the Act, 29 U.S.C.A., Sec. 160(f), the charging parties, approximately ten months after the Board's decision, filed a petition for review by the United States Court of Appeals for the Fourth Circuit. Present petitioner intervened and filed a brief. After argument, the Court of Appeals reversed

[1] 29 U.S.C.A., Section 158, (b) (1) (A), (2), (3), and (4) (A) and (B).

[2] Bricklayers', Masons' and Plasterers' International Union of America, AFL.; Tile and Terrazzo Workers' Local No. 4, AFL.; International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters' Helpers, Marble, Mosaic and Terrazzo Workers' Helpers, AFL.; Tile and Marble Helpers and Polishers Local No. 29, AFL.; Terrazzo Helpers Local No. 81, AFL.

the decision of the Board, and remanded the case to that agency for the entry of an appropriate order against the Council.[3]

The record in the case is voluminous;[4] however, the facts material to the questions presented can be summarized succinctly by a review of those found by the Board. (Petitioners' App. 37, et seq.)[5]

On April 21, 1955, a strike was called, jointly, by Local Union No. 4 of the Bricklayers' International Union and Local Unions Nos. 29 and 81 of the Stone Polishers International Union against Selby-Battersby and Company, a union subcontractor. The strike was called because Selby-Battersby refused to incorporate in its collective bargaining agreements with the said locals, the terms of a so-called Standard Agreement. Among other things, the Standard Agreement contained provisions (A) which would permit employees covered by the agreement to refuse to work on a job on which were employed any non-union workers of the building construction trades; and (B) which required that subcontractors and general contractors, signatory to the Standard Agreement, do business only with other contractors who were also signatories thereto.

The Standard Agreement was evolved and drafted during the course of a series of meetings and discussions commencing on January 6 and terminating March 24, 1955, in

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[3] Selby-Battersby and Company v. N.L.R.B., 4 C.C.A., 259 F. 2d 151.

[4] The hearing lasted 59 days, and the transcript of testimony covered 6506 pages. Detailed summary of the facts appears in the intermediate report (Petitioner's Appendix, 2 et seq.).

[5] Wherever the term "Petitioners' Appendix" appears, this should be understood as a reference to the appendix filed by the petitioners below, respondents here. The term "Appendix" (abbreviated Ap.) indicates the appendix to this petition.

which the participants were: certain representatives of international unions in the building and construction trades, and certain representatives of employers and employer associations in the building industry. The foregoing representatives acted jointly within the framework of a tentative organization referred to as the Joint Conference Planning Group.

On March 24, 1955, contemporaneously with the formalization of the Standard Agreement, the joint union-employer organization was formalized as the Joint Conference Board, and regular meetings resumed on that basis. Among other things, the program of the Joint Conference Board included execution of the Standard Agreement by international unions and employer associations; regular publication of directories listing parties to the Standard Agreement; and the incorporation of the terms of the Standard Agreement in the regular collective bargaining agreements negotiated between the local unions and the individual employers and associations (Pet. App. 39).

Upon completion of the plans for the implementation of the Standard Agreement, certain local union officers were appointed by their respective international representatives as alternates to the Joint Conference Board. Frank Ellis, business manager of the Tile and Terrazzo Workers' Local Union No. 4, and President of the Council (Pet. App. 40), was made such an alternate for the Bricklayers international representative. Alternates had no vote when the international representative was present. The Council, present petitioner, was never represented in either the Joint Conference Planning Group or the Joint Conference Board, and Ellis never acted for the Council in the negotiations with Selby-Battersby or in the inducement of the employees to strike. The trial examiner found, and the Board approved

the finding, that the Council did not take an active part in carrying out the program to implement the Standard Agreement. And, as has been indicated, the Council had not participated directly, or vicariously by representation, in the evolution of the Agreement.

The trial examiner predicated his conclusion of Council responsibility upon the following facts: (1) Prior to June 28, 1954, Council, together with Local 16 of the Iron Workers Union, were alleged to have violated Section 8(b) (4) (A) of the Act,[6] in connection with picketing in which the Council participated directly, of certain building construction projects in Baltimore. The Board originally dismissed the complaint in that case, but the conduct in question was declared unlawful by the Court of Appeals for the Fourth Circuit on petition for review.[7] As noted by the Board in its decision in the present case, the conduct under scrutiny in the *Stover Steel* case preceded by more than 6 months the filing of the charges in this case on May 3, 1955 (Pet. App. 41).

(2) On December 3, 1954, Frank Ellis, *acting in his capacity as Council President*, sent a letter to the President of the Building and Construction Trade Department, AFL (hereinafter the "Department"). The substance of the letter was a request of the Departments' President that he "refer this communication to the various International Presidents and ask them to again send their representatives in to Baltimore to lay plans to help the non-union situation in Baltimore and vicinity" (Pet. App. 42). On December 20, 1954, the Secretary-Treasurer of the Department addressed a letter to the general presidents of its affiliate

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[6] 29 U.S.C.A. Section 158 (b) (4) (A).

[7] John A. Piezonki, d/b/a Stover Steel Service v. N.L.R.B., 219 F. 2d 879 (C.A. 4).

international unions informing them of Council's request and asking that representatives be assigned to Baltimore to attend meetings in January, 1955 with a view to developing an organizing plan to combat the serious non-union conditions in that area.[8] Following the above communications, the events noted earlier, leading to the organization of the Joint Conference Board and the drafting of the Standard Agreement, took place.

(3) After the provisions of the Standard Agreement had been formalized by the members of the Joint Conference Board, collective bargaining negotiations began between the Tile and Terrazzo Workers Local No. 4 (hereinafter "Local 4") and Selby-Battersby. Frank Ellis, as business agent and recording secretary of Local 4, and as was customary in previous negotiations, participated in the bargaining. A series of meetings and telephone conversations occurred during which Ellis, as bargaining representative of Local 4, sought to persuade Selby-Battersby to sign the Standard Agreement. On several occasions during these meetings and conversations the employer's representative asked what would be the consequence of its refusal to sign the agreement, and Ellis replied, in substance, that the employer would have to operate without union men.

At a meeting on April 21, 1955, which was attended by Ellis, Business Manager of Local No. 4, Menotti, International representative of the Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, other union officials, and substantially all of Selby-Battersby's Baltimore, Maryland, tile and terrazzo employees, the union officials (including Ellis) advised the employees that Selb-

[8] The full text of the letter appears at footnote 10 of the intermediate report (Pet. App. 61).

Battersby had refused to sign the Standard Agreement, and they were, therefore, to cease working for Selby. Following the advice of their union officials, the employees went on strike. It was this strike which gave rise to the filing of the unfair labor practice charges noted above.

After the cessation of work (on April 21) a meeting was held in Washington, D. C. Union officials present were the Secretary of the Bricklayers, Masons and Plasterers International Union of America, the Treasurer and the International Representative of the last named organization, and Frank Ellis, Business Manager of Local No. 4 (which was an affiliate of the Bricklayer's International.) Selby-Battersby was represented by Selby himself and also present on the management side of the table were: Theodore Medford, Executive Secretary of The National Terrazzo and Mosaic Association, Inc., Fred Windsor, Executive Secretary of the Contractors' Association of America, Inc.,[9] and two other persons who were officers of the Selby-Battersby Company. During the course of the meeting — which was held on April 26, 1955 — Selby mentioned his employees in the shipyards who were union members and Ellis remarked: "Well, if you don't sign the Agreement, we are going to go after your men in the shipyards." The international's secretary commented: "Mr. Ellis, it is your duty as a representative of the American Federation of Labor to get into the shipyard" (Pet. App. 23).

The meeting concluded with an understanding that Selby was going to give further consideration to the matter of the Standard Agreement. Shortly thereafter, on May 3, 1955, the charges here involved were filed. On May 4, 1955 the President of the Resilient Floor Decorators, Local 1754 of the United Brotherhood of Carpenters and Joiners of

[9] Selby is a member of each of these employer associations.

America, a Baltimore Local, sent notices to its members employed by Selby-Battersby in the shipyard at Baltimore, to cease working for Selby; and the reason given was Selby's failure to sign "the agreement" (Pet. App. 24). However, during the hearing, the President of Local 1754 denied the suggestion that the notices were sent on Ellis' advice, and the trial examiner found that Local 1754 was not affiliated with the Council and had not participated in the formulation of the Standard Agreement.

The trial examiner, on this record, concluded that "the inducement (to strike Selby-Battersby) was one of a series of related acts in a joint venture and on this basis alone the Council is responsible. Furthermore, in view of the position of the Council in relation to its affiliated unions and the prior unlawful inducement of employees to strike engaged in by the Council itself (referring here to the *Storer Steel* case, *supra*) the Council was aware of the pitfalls that might be encountered in a program such as that under consideration and was on notice that in carrying out the current program its affiliated unions might take their cue from past conduct of the Council and likewise engage in inducement of employees" (Pet. App. 27).

The Board disagreed, holding the evidence was "insufficient to sustain a conclusion of Council responsibility" (Pet. App. 44), and expressly disapproved of the trial examiner's use of evidence, as the basis of an essential finding of fact, barred by Section 10(b) of the Act (Pet. App. 41).

On petition for review, the United States Court of Appeals for the Fourth Circuit, after a review of the record and the findings of the Board, concluded that the Board had erroneously rejected the trial examiner's recommenda-

tions since "the Council instigated the course of events which proceeded, for the benefit of the Council, * * *" and set aside the Board's order of dismissal.

ARGUMENT

I.

In Reversing the Decision of the National Labor Relations Board, the Court of Appeals Erroneously Disregarded the Provisions of Section 10(f), 29 U.S.C.A. Section 160(f), Labor-Management Relations Act, 1947, as Amended.

In enacting the National Labor Relations Act (now superseded by the Labor-Management Relations Act, 1947) Congress envisaged a multiplicity of intricate problems of collective-bargaining and labor relations with which the courts, as presently constituted, are not equipped to deal. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). Accordingly, primary jurisdiction under the Act was vested in an administrative agency, the personnel and machinery of which were conceived with a view to solving the special problems raised by the economic balance between labor and management sought to be achieved by the legislation. However, consistent with the concept of due process, Congress recognized that legal problems of a delicate nature, can be properly resolved only through the process of traditional litigation. Cf. the opinion of Judge Learned Hand in *N.L.R.B. v. Standard Oil*, 138 F. 2d 885 (C.A. 2) 1943. A reconciliation of those two objectives resulted in the enactment of section 10(f) of the present act, as follows:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to

> have been engaged in * * * the findings of the Board (on such review) with respect to questions of fact if supported by *substantial evidence on the record considered as a whole* shall * * * be conclusive.[10]

We need not cite cases to this court to support the proposition that the congressional intention regarding the scope of judicial review sought to be expressed by the language of Section 10(f) has been exceedingly difficult to apply. We also recognize that this Court has said that its "power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly applied." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S. Ct. 456, 466. We respectfully submit that the Court of Appeals in the present case, either *misapprehended* or *grossly misapplied* the test for the proper scope of judicial review envisaged by Section 10(f), and arbitrarily substituted its own judgment for that of the Board.

The Board indicated in its opinion that "there is no substantial dispute as to the facts" (Pet. App. 39); and the Court of Appeals, speaking through Judge Haynesworth, also stated that it was not resolving questions of fact but merely deciding "the legal conclusion to be drawn from the substantially undisputed facts" 259 F. 2d 151, 155. At

[10] For the difference between the earlier test and the newer one of "substantial evidence on the record considered as a whole," cf. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S. Ct. 456, wherein Mr. Justice Frankfurter reviews the legislative history of the concepts.

first glance, therefore, it would appear that the Court of Appeals decided a "pure" question of law, and the limitations of Section 10(f) are not involved. However, it is submitted that the Court of Appeals erred in overlooking the distinctions between "*raw facts*", and the *inferences of fact* to be deduced therefrom. This distinction was recognized, though not elucidated, in *N.L.R.B. v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 62 S. Ct. 960 (1942); and although it is clear that the subsequent amendment of the old equivalent of section 10(f), as construed by Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, limited *Consolidated Copper*, it is also clear that the *distinction* to which we refer was not destroyed or limited. It is a *real* distinction, existing independently of the judicial will, abiding as it were, in the nature of things. Courts and text writers have used the terms "*primary*" or "*evidentiary* facts" and "ultimate facts" or conclusions when referring to this distinction. Cf. International Association of Machinists and Production Workers v. N.L.R.B., 110 F. (2d) 29, 35 (C.C.A. D.C. 1939), aff'd 311 U.S. 72, and Forkosch, *Judicial Review, Has the "whole Record" Formula Superseded the "Substantial Evidence" Rule*, 3 Labor Law J. 455, 457 (1952). However, it is not clear that the courts always have the same concepts in mind when the distinctions are employed. Cf. United States v. Pierce Auto Lines, 327 U.S. 515, 533, 66 S. Ct. 687, 695 (1946).

In the present case the trial examiner drew certain *inferences of fact* from undisputed evidence, and the Board, recognizing that the testimony was undisputed, nevertheless refused to concur in the trial examiner's inferences. Thus the examiner concludes his intermediate report as to petitioner's responsibility in these words (Pet. App. 25-26):

In the final analysis the question here is, was the inducement of employees to strike part of a joint course of action in which the Council was a participant? The record as a whole makes it plain that the Council had in the recent past engaged, *unlawfully*, in a campaign directed at open-shop general contractors to require them to employ members of its affiliated building craft unions, that the Council initiated the movement which resulted in the formation of the Joint Conference Planning Group and the Joint Conference Board which in turn, formulated an attempt to carry out a program directed toward unionization of open shop contractors, that *such a program was the aim of the Council in initiating the movement noted herein*; and that those engaged in the activities outlined in this report did so in furtherance of this objective and program * * *

After *initiating* the *current movement* to unionize open shop contractors, and obtaining the personnel * * * to make effective such a program, the Council as a unit did not take an active part in carrying out the program. However, its president was a major participant in the specific conduct under attack, and the members of its executive board and practically all of its officers and of its affiliated unions were active in carrying out the program and the Council took no affirmative action to disassociate itself from the activity. In view of the position of the Council in relation to its affiliated unions, the prior unlawful inducement of employees to strike engaged in by the Council itself, the activities noted in this report, and the benefits to the Council of such activities the failure of the Council to disassociate itself from the program under consideration has special significance — *it borders upon implied sanction and approval*. Furthermore, the statements at the April 26 meeting about calling shipyard workers off their jobs, followed by instructions from a union not affiliated with the Bricklayers, Masons and Plasterer's Union *implies that the union spokesmen at the April 26 meeting were acting*

in more of a capacity than that of representatives for the Bricklayer, Masons and Plasterers' International Union of America or for Local 4 thereof.[11] (Emphasis added.)

The inferences of fact (not conclusions of law) drawn by the trial examiner might be summarized thusly: (1) the Council's *motive* in calling for the assistance of the Department was to carry on its *past unlawful* activities; (2) *that in initiating* the movement the Council must have *contemplated the unlawful course* of conduct pursued by the Joint Conference Board; (3) that, in failing to take affirmative action to disavow the subsequent implementation of the Standard Agreement the Council *approved* that conduct; (4) that Ellis spoke as a representative of the Council when he mentioned going after Selby's employees in the shipyards.

Assuming *arguendo* that the evidence would have warranted such inferences, it is clear that the Board did not adopt them after reviewing the record; and we stress the fact that the Board, in rejecting the examiner's inferences, was not resolving *issues of credibility or conflicts in testimony.*

With respect to each of the inferences noted above, the Board explicitly, or indirectly, spoke. (1) "The content of the December 3 letter * * * (requesting assistance of the Department) as well as the ensuing exchange of correspondence between Council and the Building and Construction Trades Department indicate no unlawful design on the part of Council" (Pet. App. 41-42); (2) without an unlaw-

[11] Though not important to the question of whether certiorari should be granted, the Court's attention is called to the fact that Local 1754 was not only *not* affiliated with the Bricklayers International, but was *not* affiliated with the petitioner (See Petitioner's Appendix 24, and note 32 thereon).

ful design it could hardly be said that an unlawful course of conduct was contemplated]; (3) "As was the apparent finding of the Trial Examiner, the record is devoid of evidence that Council was at any time represented in either the Joint Conference Planning Group or the Joint Conference Board or that Ellis, at any time acted for Council in the negotiations with Selby-Battersby, and in the inducement of employees to strike * * * It was the specific finding of the trial examiners that 'Council as a uni' did not take an active part in carrying out the program' " (Pet. App. 40). (And needless to say, therefore, there was no occasion to disavow that in which it was not a participant); and (4) "we find no adequate support in the record for a conclusion that Ellis, in relation to (the April 26 meeting) was acting for the Council" (Pet. App. 43).

We set forth the above conflicts in *conclusions of fact*, not to support the petitioner's position on the merits, but to demonstrate that the Board's *findings of fact differed* from those of the trial examiner and that the Court of Appeals erred when it said, 259 F. 2d 151, 155:

> The Board agreed with the Trial Examiner that the question is largely the legal conclusion to be drawn from substantially undisputed facts * * *

In conformity with the view embodied in the quoted phrase, the Court proceeded in its opinion to review the Board's findings and adopted the trial examiner's *inferences*, under the name of *legal conclusions*.[12] A careful reading of the opinion of the Court of Appeals will disclose no conscious recognition by it of the limitations imposed by

[12] It might be more accurate to say that the Court *disregarded* the *Board's* conclusions of fact, insofar as they differed from those of the trial examiner, *adopted* those of the trial examiner, proceeded to draw a *legal conclusion* which it thought was required by the *undisputed* facts.

section 10(f) of the act; and while the *Universal Camera* case, 340 U.S. 474, authorizes consideration of the trial examiner's findings by the Court of Appeals in deciding whether the Board's findings are supported by substantial evidence on the record as a whole, we submit that it was not the intention of 10(f), or the purport of *Universal Camera*, to *substitute the trial examiner* for the *Board* as the administrative tribunal. As this court said in the latter case, 71 S. Ct. 456, 465:

> To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. 71 S. Ct. 456, 465.

We do not suggest that the Court of Appeals in the case at bar should not have considered the trial examiner's report as part of the "whole" record. Indeed, this was the holding of the Court of Appeals for the Second Circuit which required a reversal in *Universal Camera*. But we do respectfully urge that the court in the present case *did not resolve a conflict between the findings* of the Board and its examiner, as was apparently envisaged by this court's language in the *Universal Camera* case; rather, failing to recognize the conflict in findings — though urged to do so by the petitioner — the court adopted the trial examiner's

inferences, treated those inferences as *facts* found by the Board, and then concluded that the Board had erroneously applied the law to the facts thus found. Thus at page 155 of the court's opinion we find:

> The Board agreed with the trial examiner that the question is largely the legal conclusion to be drawn from substantially undisputed facts, but the Board fell into *legal error* when it ruled that the instigator of wrongful conduct is not responsible for the consequence if he does not realize at the time he acts that the intended conduct is wrongful. (Emphasis added.)

And again at p. 156

> The Board does not suggest that the Trial Examiner was wrong in his conclusion that the council was the *instigator* of the conduct. (Emphasis added.)

These remarks of the Court of Appeals indicate fairly clearly that court's view that it was deciding, merely, a legal question upon a fixed matrix of facts. But as we have already noted, the court answered the legal question by adopting the trial examiner's inferences without, itself, making a determination of the reasonableness of the Board's refusal to adopt such inferences. It is respectfully submitted that the minimal requirements of Section 10(f), 29 U.S.C.A. Section 160(f), cannot be met unless such a determination is made. To hold otherwise is to substitute the trial examiner's judgment, and the Court of Appeals' view of that judgment, for that which Congress intended should repose in the National Labor Relations Board. For the foregoing reasons it is respectfully submitted that this Court should exercise its discretion and issue the writ of certiorari.

II.

The Court of Appeals Arbitrarily Disregarded the Provisions and Limitations of Section 10(b) of the Labor Management Relations Act, 29 U.S.C.A. Sec. 160(b), Which Imposes a Six Month Period of Limitations Upon the Filing of Unfair Labor Practice Charges; and the Provision in Question, of Importance to the Proper Administration of the Act, Has Not Been Construed by This Court.

For reasons not material to the questions now before this court, Congress saw fit to impose a six month period of limitations upon the Board's powers to deal with unfair labor practice charges by enacting section 10(b) as follows:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue * * * a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof * * * *Provided*: That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.

In previous decisions the Board, with the approval of reviewing courts, has held that the intention of Congress in enacting the quoted section was to impose a statute of limitations and not a rule of evidence; and that conduct which itself was barred by limitations could be introduced as *back-ground evidence* to throw light upon conduct legitimately under scrutiny, N.L.R.B. v. General Shoe Corp., 192 F. 2d 504, 1951 (C.A. 6). However, the Board has also held, with court approval, that such *back-ground evidence* may not serve the *office of proof* of an unfair labor practice where the record, *independently of such evidence*, would not support the charge before the board. Superior Engraving Co. v. N.L.R.B., 183 F. 2d 783 (C.A. 7) cert. denied, 340 U.S. 930.

In the present case the trial examiner predicated an *essential finding* of fact — the wrongful motive of the Council in requesting aid from the Department — upon evidence of Council's conduct condemned in the *Stover Steel* case, which conduct had occurred more than six months prior to the filing of the charges at bar. The Board expressly condemned that procedure, saying:

> The *Stover Steel* case was decided by the Board on June 28, 1954, which preceded by more than 6 months the filing of the charge herein * * * therefore, under Section 10(b) of the Act, Council's conduct evidenced in the *Stover Steel* case may not serve as a basis for an unfair labor practice finding. The trial examiner was thus in error in predicating his finding of Council's responsibility on evidence of Council's past conduct in the *Stover Steel* case. While Section 10(b) would permit the *Stover Steel* conduct of Council to be considered as *background evidence* (emphasis added), — essentially the only fact in the record that can be construed in the light of such background is Council's December 3, 1954 letter to the Building and Construction Trades Department. The content of the December 3 letter * * * indicate(s) no unlawful design on the part of Council (Pet. App. 41-42).

Thus the Board applied its construction of 10(b) to the findings of the examiner and held that the examiner was in error. A careful reading of the opinion of the Court of Appeals will disclose no conscious recognition by it of the significance of Section 10(b), or of the Board's application thereof to the record before it. Present petitioner urged upon the court the Board's view, but the Court of Appeals utterly disregarded the important legal question thus presented. We submit that in so doing the Court of Appeals abdicated its *primary function* of deciding questions of law properly submitted to its judgment. Cf. On this problem

generally, Issacs, *The Law and the Facts*, 22 Col. L. Rev. 1, 11-12 (1922).

The importance of section 10(b) to the proper administration of the act cannot be better demonstrated than by a partial citation of the numerous decisions in which it was construed and applied. See N.L.R.B. v. Itasca Cotton Mfg. Co., 179 F. 2d 504, 1950 (C.A. 5); Cathey Lumber Co., 86 N.L.R.B. 157 (1949); Potlatch Forests, Inc., 87 N.L.R.B. 1193 (1949); Sun Oil Co., 89 N.L.R.B. 833 (1950); Greenville Cotton Oil Co., 92 N.L.R.B. 175 (1950); N.L.R.B. v. Nettleton Co., 241 F. 2d 130, 1957 (C.A. 2); N.L.R.B. v. Textile Machine Works, Inc., 214 F. 2d 929, 1954 (C.A. 3); News Printing Co., Inc., 116 N.L.R.B. No. 27, (1956); Senorita Hosiery Mills, Inc., 115 N.L.R.B. No. 212 (1956). Tennessee Knitting Mills, 88 N.L.R.B. 1103; Superior Engraving Co. v. N.L.R.B., 183 F. 2d 783 (C.A. 7) cert. denied 340 U.S. 930.

III.

The Court of Appeals, in Disregarding the Provisions of Two Important Sections of the Act, and in Predicating Its Decision Upon a Finding of Vicarious Liability Under the Act, So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Preceding argument, we submit, demonstrates that the Court of Appeals, *completely disregarded* the provisions of Sections 10(b) and 10(f) of the act, even though the pertinence of those provisions was expressly called to its attention by the record before it. Such an abdication of the judicial function would alone suffice to justify review by this court.

It is further submitted that the Court of Appeals, by its action noted in argument above, in effect, created a new concept of vicarious liability unknown to the common law. The opinion of the court below makes it plain that the liability which it sought to affix to the Council, present petitioner, was that of an "instigator" or inducer of wrongful conduct.

> We think the record warrants the conclusion that the Council did retain responsibilities in these areas and, through its President, sought to discharge them. We need not decide whether the record requires that conclusion, however, *for it is enough that the Council instigated the course of events* which proceeded, for the benefit of the Council, to the climax which was contemplated from the beginning * * * 259 F. 2d 151, at 157, citing Judge Learned Hand in International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B., 181 F. 2d (C.A. 2). (Emphasis added.)

It is of course sound law that an instigator of a wrong makes himself a party to the wrong. But it has also always been regarded as sound law that one cannot be deemed an instigator unless he has, and the evidence establishes that he has, a *wrongful intent*, either tortious or criminal. Morei v. U. S., 127 F. 2d 827 (C.C.A. Ohio); Bacon v. U. S., 127 F. 2d 985 (C.C.A. Okla.); Johnson v. U. S., 195 F. 2d 673 (C.C.A. Ark.); 22 C.J.S. *Criminal Law*, Section 87, and cases cited.

In the present case, the record is devoid of evidence upon which the Board, or the Court of Appeals, could have predicated a finding of Council's intent or *motive* in writing the letter to the Department upon which the conclusion that Council was an "instigator" of a wrong hangs. As the Board noted (Pet. App. 41-42) the *only* evidence of record as to that motive was conduct liability for which was barred by

Section 10(b). Therefore, if the preceding argument as to the Court of Appeals' disregard of that provision is sound, it follows that its conclusion that Council was an "instigator" begs a question essential to its decision, and the *result* of the case is to fix vicarious liability in a manner heretofore unrecognized by the common law or by this court.

IV.

The Decision of the Court of Appeals Conflicts With a Decision Rendered by the United States Court of Appeals for the Seventh Circuit.

In Superior Engraving Co. v. N.L.R.B., 183 F. 2d 783, 1950 (C.A. 7) it was held that conduct of an employer liability for which was barred by the six month limitation period set by Section 10(b) could not form the basis of a finding of fact essential to a charge then before the Board; the decision, in effect, adopted the Board's view, expressed in this case, that the statute cannot be circumvented by introducing *back-ground* evidence of unlawful conduct otherwise barred by 10(b), and then using such evidence to convert innocent conduct into a violation of the act.

However, the Court of Appeals, as we have already noted at length, adopted the trial examiner's conclusions which were predicated upon so-called *back-ground evidence*, and without which his conclusions could not stand, without taking cognizance of the import of Section 10(b). The conflict between the court's holding in this case, and the holding in *Superior Engraving (supra)* does not appear upon the face of the court's opinion. But this is so because the Court *utterly disregarded* the import of Section 10(b); if we assume that the court did so because it did not concur with the Board's view of that section's effect, the conflict is clear.

If, on the other hand, we assume that the court disregarded Section 10(b) inadvertently, then reversal is required for reasons noted in Parts II and III of this petition. In either case, it is submitted, this court should grant certiorari.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

29 U.S.C.A. Sec. 160.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board, in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme

Court of the United States pursuant to section 2072 of Title 28.

* * * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

OPINION OF COURT

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 7600.

Selby-Battersby and Company, and Associated Builders and Contractors of Maryland, Incorporated, Petitioners

versus

National Labor Relations Board, Respondent,
and
Baltimore Building and Construction Trades Council, Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued June 3, 1958. Decided September 12, 1958.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Earle K. Shawe and Sidney J. Barban (William J. Rosenthal, Wilson K. Barnes, and Anderson, Barnes, Coe & Morrow on brief) for Petitioners; William J. Avrutis, Attorney, National Labor Relations Board, (Jerome D. Fenton, General Counsel; Thomas J. McDermott, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Arnold Ordman, Attorney, National Labor Relations Board, on brief) for Respondent; and Thomas E. Bracken (Christopher H. Foreman; Callegary, Bracken & Callegary; Martin F. O'Donoghue and Thomas X. Dunn on brief) for Intervenor.

HAYNSWORTH Circuit Judge:

Three local unions, the parent Internationals and the Baltimore Building and Construction Trades Council, with

which the Locals were affiliated, were charged with violations of § 8(b) of the Labor-Management Relations Act, 29 U.S.C.A. § 158(b). After the presentation of the case for the General Counsel in a hearing before a Trial Examiner, the Internationals and the Locals entered into a settlement stipulation with the General Counsel. Further hearings were held as to the Baltimore Building and Construction Trades Council, which denied responsibility for the conduct. The Trial Examiner concluded that the Council was responsible for the conduct and that it had violated §§ 8(b)(1)(A), 8(b)(2) and 8(b)(4)(A) of the Act. He recommended an appropriate cease and desist order directed to the Council. The Board, however, held that the facts did not support the conclusion that the conduct was attributable to the Council, and dismissed the complaint as to the Council.[1] The case is brought here upon the petition of the charging parties.

The controversy grew out of a strike against a subcontractor, employing only union labor, who declined to sign a contract prohibiting its doing work for "open shop" general contractors. An appraisal of the role of the Council requires consideration of the events and circumstances which led to the strike.

Background

Under the Constitution of the Building and Construction Trades Department, AF of L-CIO, it has chartered some nineteen international unions and many state and local councils. Each council is composed of delegates from affiliated local unions, chartered by the Internationals, within the area of its jurisdiction, and the business agents of the affiliated Locals constitute the Executive Committee of the Council. The Council is the agency upon which is placed primary responsibility for organizing workers in the construction trades, and it is intended to coordinate the efforts of the Locals and lend assistance to them. The Constitution of the Department expressly provides that no

[1] 117 N.L.R.B. 366.

local union shall "be allowed to inaugurate strikes without the local council's consent."

The Constitution and By-laws of the Baltimore Building and Construction Trades Council incorporate the principle, long the chief organizational weapon in the construction trades, that, "No member of any affiliated union will be allowed to work on a job where there are non-union men of any craft at work, except by special dispensation by the Council. * * *." This principle was not being effectively enforced in Baltimore, however, and in 1949 union general contractors began to complain to Frank Clark Ellis, President of the Council, that union subcontractors were working for open shop general contractors. The contracts of the general contractors required that they accept bids from union subcontractors only, while their open shop competitors had the advantage of bids from both union and non-union subcontractors. Ensuing discussions and warnings finally culminated in 1953 in a strike of the employees of union subcontractors on a construction project of open shop general contractors. The Council was charged with unfair labor practices in connection with that strike; the Board dismissed the charges, Baltimore Building and Construction Trades Council; (Stover Steel Service) 108 N.L.R.B. 1575, but this Court set aside the order of the Board, *Piezonki d b a Stover Steel Service v. National Labor Relations Board*, 4 Cir., 219 F. 2d 879, holding the strike to have been in violation of § 8(b)(4)(A) of the Act, 29 U.S.C.A. § 158(b)(4)(A).

In the interim between the decision of the Board and that of this Court in the Stover Steel case, the ephemeral victory before the Board was cheered by the Business and Construction Trades Department in its October 1954 bulletin as validation of the traditional organizing methods of the councils. The Baltimore Council, in the same month employing the "same methods as we won with in the Stover Steel case," called another strike of union employees of subcontractors working for an open-shop general contractor, Dominion Contractors. The Dominion strike was

halted by an injunction, and Ellis appealed to the Department for legal and financial assistance, explaining, "We just can't let this organizing method go down the drain."[2]

"THE STANDARD AGREEMENT"

On December 3, 1954, Ellis, for the Council, again sought assistance from the Department, requesting that a representative of each International be sent to Baltimore to help in the elimination of the "deplorable" open shop conditions in that area. Frank Bonadio, Secretary-Treasurer of the Department, after further correspondence and conferences with Ellis, requested each International to send a representative to Baltimore to attend a series of meetings, arrangements for which had been made by Ellis, and to provide continuing attention and advice. Bonadio, himself, attended, and presided at, the first series of meetings, principally for the purpose of achieving more complete cooperation among the Baltimore Locals. He had been concerned over the withdrawal from the Council of a large Carpenters Local, and he wanted to effect its reaffiliation.

The International representatives, sent to Baltimore for the purpose, first met together on January 6, 1955, and then, with the business agents of the Baltimore Locals. The next day the combined group met with a committee representing union contractors. It was agreed at these meetings that, at the outset, greater cooperation could be effected if the movement was led by the International representatives, rather than the Council or the business agents of the Locals. Each business agent present agreed to adopt and execute any plan of action the International representatives might agree upon, and a subsequent meeting between representatives of employers and the International representatives, collectively referred to as the "Joint Conference Group," was scheduled. This group on March 24, 1955 agreed upon an adaptation of a contract previously used in Chicago and which they called "The Standard

[2] The Dominion Contractors case was subsequently settled when the Council agreed to a Board order enforced by a consent decree in this Court.

Agreement," as the means of eliminating the open shop contractors. The Standard Agreement contained provisions prohibiting the employer from contracting for work with any other contractor, if the other contractor was not a party to the agreement and permitting the withdrawal of union men from any job if non-union men were engaged in construction work on the project. During the preceding summer Ellis had attempted to persuade The Tile, Terrazzo and Marble Contractors Association to accept a contract with similar provisions. Timely notice of contract change had not been given, however, and he was unable to insist upon it at that time.

The Council had no representation, as such, in the Joint Conference Group. There was testimony that Ellis, President of the Council, sought to attend one of the meetings, but was excluded. It is clear, however, from a tentative draft of The Standard Agreement, circulated by the employer members of the Group to all members of their association of employers, that it was first contemplated that the Council would sign the agreement as the representative of the Baltimore Locals. The autonomy of each Local was such that each had the right to determine for itself whether or not it was to be bound by any agreement, some locals were not represented by the Council, and some members of the Board were opposed to the Council's participation in the agreements. The Council did not become a formal party to The Standard Agreements.

The Locals, as the Council, had no representation, as such, on the Joint Conference Group, but when the Group finally settled upon the form of The Standard Agreement it reorganized itself into a Joint Conference Board, composed of the same members as the Group, but with the addition of the business agents of the Locals subscribing to the agreement as alternates for the International Representatives. Many of the International Representatives were on temporary assignment in Baltimore, and it was contemplated that their work on the Board would be taken over gradually by their alternates. Ellis, President of the Council, and other business agents who were members of the

Executive Committee of the Council thus became alternate members of the Board.

Implementation Of The Standard Agreement

Belief in the effectiveness of The Standard Agreement as an organizing weapon arose out of the fact that some trades in Baltimore, among them, terrazzo mechanics and helpers, were completely organized. If open shop general contractors could be deprived of their services, it would be difficult or impossible for them to bid upon construction projects where those skills were required. It was hoped that such pressures would compel open shop general contractors to capitulate to union demands, forcing their own employees to become members of the union. If the open shop general contractors could be forced, by this means, to accept The Standard Agreement, non-union subcontractors would be confronted with the alternative of capitulation or liquidation. The purpose of The Standard Agreement required that the pressures behind it be directed against those union subcontractors who employed workers in the fully organized trades, as the terrazzo mechanics and helpers, and, if the purpose was to be accomplished it was essential that each employer of those trades be brought into compliance or put out of business.

Negotiations for a new contract for a period beginning April 1, 1955 with The Tile, Terrazzo and Marble Contractors Association covering the members of Tile and Terrazzo Workers Local No. 4, affiliated with Bricklayers, Masons and Plasterers International Union of America, began in January 1955. Ellis, who in addition to his office as President of the Council was business agent of Local 4, with a committee from Local 4, conducted the negotiations. Economic matters were discussed at each meeting until late February when Ellis informed the representatives of the employers that any agreement must incorporate the terms of The Standard Agreement, which was then under consideration in tentative form, by the Joint Conference Group and which was identical in substance to the proposal he had urged upon the same group of employers the preced-

ing summer. The employers objected that the agreement would deprive them of substantial portions of their businesses, and the matter was the principal topic of discussion at subsequent meetings in March. All of these meetings were held in the offices of the Council, not those of Local 4.

On March 29, 1955, a committee of employer and union members of the Joint Conference Board met with a committee of the Tile Contractors in an unsuccessful effort to prevail upon the Tile Contractors to accept the agreement. At meetings called by Ellis and held on April 5 and 8, union officials[3] again urged acceptance of their terms. At the meeting of April 8, the employers were told that wages would be held at the current level if they accepted the terms of The Standard Agreement. Some of the employers present accepted this proposal, and a memorandum of the agreement was prepared and executed. The representative of Selby-Battersby & Company, a corporation, with its principal office in Philadelphia, engaged as a subcontractor in the installation of tile, terrazzo and resilient flooring and acoustical ceilings, demurred. He was told he would not have union men for his jobs if the agreement was not accepted. Ellis had telephone conversations with representatives of Selby-Battersby on April 11, 12, 13, 14, and on either the 15th or 16th, and on April 20, several officials of Selby-Battersby met in the Council's office with Ellis, Menotti, Boll and Poggioli. Ellis had told them previously that if they did not accept The Standard Agreement, he would have to tell union contractors who called him[4] that Selby-Battersby was non-union and the union

[3] All of the employees of the Tile Contractors were not members of Local 4. Some of them were members of Tile and Marble Helpers and Polishers Local 29 while other were members of Terrazzo Helpers Local 81. Locals 29 and 81 were affiliates of International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers. Boll, a representative of that International and business agent of Local 29, Poggioli, business agent of Local 81, and Menotti, international representative of the Bricklayers, in addition to Ellis, were the union officials present.

[4] Such inquiries were frequently received by him as President of the Council.

contractors could not accept its bids. The officials of Selby-Battersby plead that their employees were all members of the unions and that curtailment of their job opportunities would be hurtful to their employees as well as to the company. Ellis repeated an earlier statement that he would have to leave out the name of Selby-Battersby in a directory of union contractors then being compiled by the Joint Conference Board, but the employer's officials were unyielding. One of them inquired what would happen next. Menotti said that was up to Ellis, and Ellis said, "You don't have any men working for you. That is all."

The tile and terrazzo employees of Selby-Battersby were told, in a meeting held the next morning, they could no longer work for Selby-Battersby. One of the employees objected that they were happy with their employment and were not concerned about the employees of other employers. They were then given the choice of doing as they were told or surrendering their union books and membership. They chose obedience.

On April 26, five days after the beginning of the strike, officials of Selby-Battersby met in Washington, at their request, with officials of the Bricklayers and Frank Clark Ellis. They sought unsuccessfully some moderation of the position of the unions, mentioning, during the course of the discussion, that when construction work was slack in Baltimore, they had, nevertheless, provided full employment for their employees by assigning them to shipyards where Selby-Battersby had contracts. The Secretary of the Bricklayers stated he felt it the duty of Mr. Ellis to "get into the shipyard," and Ellis expressed his intention of doing so. Selby-Battersby employees in a shipyard in Baltimore were members of Resilient Floor Decorators Local 1754, an affiliate of the Carpenters, but the day after the charges were filed in this case they were advised by telegram from the president of their local that they were to work no longer for Selby-Battersby. The Trial Examiner found that this command, later countermanded, was given at the instance of Ellis and was a consequence of the conversation in Washington on April 26.

Conclusion

The Trial Examiner concluded that the Council initiated the course of events and was the instigator of the conduct, and that it subsequently participated with the Joint Conference Board, in an unlawful joint venture. The Board disagreed because the evidence disclosed no consciousness of an unlawful purpose when the Council initiated the course of events and because it related all of the subsequent conduct of Frank Clark Ellis to his position as Business Agent of Local 4 rather than to his office as President of the Council. The Board agreed with the Trial Examiner that the question is largely the legal conclusion to be drawn from substantially undisputed facts, but the Board fell into legal error when it ruled that the instigator of wrongful conduct is not responsible for the consequence if he does not realize at the time he acts that the intended conduct is wrongful.

It is true, as the Board points out, that the Council's letter of December 3, 1954, in which it asked for help in planning an organizing campaign, and subsequent correspondence discloses no conscious purpose to violate the law. Indeed, as the Board observed, until February 26, 1955 when the decision of this Court in the Stover Steel case was handed down, the earlier decision of the Board gave the Council basis for belief that its Stover Steel and Dominion "organizational" strikes were legal. Responsibility of the instigator of conduct, however, does not turn upon such subjective considerations. An erroneous belief that the intended conduct is lawful, though it may be sincerely and not unreasonably held, is no defense to the ultimate actor, and it cannot permit one who instigates the conduct or who aids and abets the commission of the wrong to escape all responsibility.

The Board does not suggest that the Trial Examiner was wrong in his conclusion that the Council was the instigator of the conduct. There is no reason to suppose that in requesting assistance in planning the campaign, the Council had in mind anything other than the exertion of pressure

upon employers through some implementation of the principle in the Council's constitution that union men would not work with non-union men. Soliciting voluntary affiliation by employees of unorganized employers is not the traditional organizing means in the construction industry. The Council might have had in mind The Standard Agreement itself, for Ellis had proposed substantially the same thing to employers the preceding summer and it had been suggested in the meetings of January 6, 1954 before the agreement to permit the International representatives to take the lead in the planning stage. The problem was more effective cooperation between the Baltimore Locals, but whatever the details of the plan, it is clear that everyone contemplated that the ultimate sanction would be a strike, if its threat was not effective, to compel union employers to cease doing business with non-union contractors. The Council, at the time may have thought there was nothing illegal in such a strike, but since it was the natural consequence of the course of events it initiated, it cannot escape responsibility for it.

Moreover, the fact that Ellis, as he played his prominent role in the implementation of The Standard Agreement, did not announce that he was acting in his capacity as President of the Council, which was intended to be the principal beneficiary of the campaign, hardly leads to the conclusion that he was acting solely as Business Agent of Local 4, which would suffer loss in a strike but could gain no direct or immediate advantage if its strike succeeded in forcing workers in other trades into other locals. Clearly he did speak as President of the Council when he told Selby-Battersby that if it did not accept The Standard Agreement, he would answer inquiries, addressed to the Council, of union general contractors by informing them that Selby-Battersby was non-union and thus ineligible to do subcontract work for them. It is difficult to see how it might be thought he did not speak in that capacity when, on April 20, he told representatives of Selby-Battersby they no longer had men working for them, for he spoke just after Menotti had said the next move was up to Mr. Ellis; he referred to the members of three different locals

and the Locals, under the Constitution of the Department, had no right to call the strike without the consent of the Council. The minutes of the Council disclose no formal action in that body, but when an officer addresses himself to the business of his office, it requires the plainest of words to disassociate his actions from the office.

Unquestionably, the Council, after initiating the program, transferred to the Joint Conference Group its responsibility for the detailed planning, and the Joint Conference Board, in which there was much antipathy toward the Council, was active in obtaining acceptance of The Standard Agreement, but nothing appears to suggest that provisions in the Constitution of the Department were to be suspended or that the Council relinquished most of its functions. One of the aims and purposes of the movement was the rehabilitation of the Council, not its impotence or its demise, and the purpose was largely accomplished when the large Carpenters Local, about which Bonadio was concerned, did reaffiliate itself with the Council about October 1, 1955 paying all arrearages in its capitation tax. Nor was the Council otherwise inactive in its support of The Standard Agreement, for the Engineers withdrew from the Council in the early fall of 1955 because they had been made to feel outcast in the Council because of the failure of the Engineers to subscribe to The Standard Agreement. The reaffiliation of the Carpenters Local and the withdrawal of the Engineers occurred some months after the strike, but there is nothing to suggest that the policy and attitude of the Council were changed in the interim.

Use of the Joint Conference Group in the planning stage seemed desirable in order to obtain the cooperation of Locals which were not affiliated with the Council, but it would seem reasonable to suppose that the Council retained something of its primary responsibility for organizing activity, its duty as the policeman of the jurisdiction and its control of the sanctions it found useful in backing its position. We think the record warrants the conclusion that the Council did retain responsibilities in these areas and, through its President, sought to discharge them. We need not decide whether the record requires that conclusion,

however, for it is enough that the Council instigated the course of events which proceeded, for the benefit of the Council, to the climax which was contemplated from the beginning, and that it took no action to disavow or dissociate itself from the actions of a man who held the office of its President. As Judge Learned Hand said in holding a union which induced another to engage in an unlawful strike equally responsible with the striking union (*International Brotherhood of Electrical Workers, Local 501, v. National Labor Relations Board*, 2 Cir., 181 F.2d 34):

> "* * * for he who provokes or instigates a wrong makes himself a party to the wrong, and is equally liable with the perpetrator. This was apparently settled as to civil liability at least as early as the third quarter of the eighteenth century: 'not only he who does an act, but who commands or procures it to be done is a trespasser. As the Restatement of Torts puts it 'for harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct.' One striking illustration is inducing a breach of contract by the obligor; or inducing the termination of a terminable business relation, which would have otherwise continued. The same doctrine prevails as to criminal liability. The principle long embodied in § 2 of the Criminal Code, which defines as a principal anyone who 'aids, abets, counsels, commands, induces or procures' the commission of the forbidden act, goes back as far as Bracton, who at folio 142 declared: 'for it is colloquially said that he sufficiently kills who advises (praecipit) killing.'"

From what is before us, there seems little doubt that the conduct was in violation of the Act, but the Board limited itself to a consideration of Council's responsibility, and we restrict ourselves to the one question presented to us. The order of the Board will be set aside and the case remanded for such further orders as may be appropriate in the light of this opinion.

Order set aside and cause remanded to Board

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 690

BALTIMORE BUILDING AND CONSTRUCTION TRADES COUNCIL,

Petitioner,

v.

SELBY-BATTERSBY AND COMPANY AND ASSOCIATED BUILDERS AND CONTRACTORS OF MARYLAND, INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO ISSUANCE OF THE WRIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, (Pet. pp. 27-38) is reported at 259 F. 2d 151. The decision of the National Labor Relations Board (herein called the Labor Board) is reported at 117 N.L.R.B. 366 (P.A. pp. 1-44).[1]

[1] "P.A." refers to the appendix filed by petitioners below, the Respondents herein, with the U. S. Court of Appeals for the Fourth Circuit in this matter. "Pet." refers to the petition for writ of certiorari in this matter.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1958. The petition for a writ of certiorari was filed on February 9, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Petitioner herein was legally responsible for activities directed at building contractors in and about Baltimore, Maryland, beginning in December, 1954.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended (61 Stat 136, 29 U.S.C. 151, *et seq.*), (hereinafter called the Act) sections 160(b) and (c) of which are set forth at pp. 25-26 of the petition.

STATEMENT

The Petitioner, Baltimore Building and Construction Trades Council, is an integral part of a labor organization complex devoted to causing building contracting employers to sign labor union contracts and engaged in administering labor union problems in the building industry. Petitioner is chartered by the Building and Construction Trades Department, AFL-CIO (hereinafter called the "Building Trades Department"), which is itself composed of so-called International Unions in the building trades industry. Petitioner is composed of local unions affiliated with such International Unions. The Petitioner has primary responsibility from the Building Trades Department to "organize" building trades contractors in the Baltimore area and to cause them to sign labor contracts (P.A. 50-51, 175-176). The traditional "organizing" means in the construction in-

dustry has been the concerted withdrawal — i.e. strike[1] — of union employees to compel employers to operate on a completely union basis and only to contract or subcontract to other employers who subscribe to that principle of the construction unions. The Petitioner subscribed and continues to subscribe to that principle and has engaged in or attempted to induce or encourage strikes in the Baltimore area in furtherance of that principle (P.A. 203, 212-214, 215-217).

In December 1954, two months after Petitioner, as a result of charges filed with the Labor Board, had been enjoined from strike activity engaged in as part of an attempt to "organize" a Baltimore building contractor, the Petitioner sought the assistance of the Building Trades Department in carrying out the Petitioner's function and purpose of causing open shop, non-union contractors in Baltimore to accede to the union demands. The Department enlisted the aid of its affiliated International Unions (which are the parent organizations of the local unions affiliated with the Petitioner) in this common project (P.A. 209, 6-7). Arrangements for a meeting in Baltimore, Maryland of all concerned, in December, 1954, were handled on the local level by the president of Petitioner. At this meeting it was mutually agreed that primary responsibility for carrying forth the common project should be placed in the hands of certain representatives of the International Unions present, with the understanding that the direction of the project would eventually be turned back to the local Baltimore unionists, as did occur (P.A. 183, 185, 9-10). The program that was instituted, known as the "Standard Agreement"

[1] In Title V, Section 501(2) of the Labor Management Relations Act, 1957, "strike" is defined as follows: "The term 'strike' includes any strike or concerted stoppage of work by employees . . . and any concerted slow-down or other concerted interruption of operations by employees"

program, was for the benefit primarily of the Baltimore construction unionists and was aided and abetted at meetings of Petitioner and by officers and representatives of Petitioner during this period (P.A. 186, 26, 155-156).

The "Standard Agreement" program which was instituted and carried forward as a result of the Petitioner's request for aid in carrying out its functions in the Baltimore area followed the traditional "organizing" principle of the construction trades unions and resulted in a strike against a union subcontractor, to compel the subcontractor to sign the "Standard Agreement", which would commit it not to do business with any other contractor who was not a union contractor. Charges against the Petitioner and other unions involved were filed on May 3, 1955.

ARGUMENT

The question presented is extremely narrow and involves solely the question of legal responsibility for certain activities, and arises from a decision of the Court of Appeals which remanded the matter to the National Labor Relations Board for a decision on the merits of the case. We are advised by the Solicitor General of the United States that he has received a letter from the General Counsel of the Labor Board with reference to the instant petition stating in part as follows:

> "The case turned principally upon the question whether on the particular facts of this case the Council was legally responsible for activity otherwise unlawful under the National Labor Relations Act. The Fourth Circuit concluded that it was and remanded the case to the Board . . ."
>
> "The Board concluded that further judicial review . . . was not warranted and, accordingly, has decided to accept the remand. . . . the Board does not contemplate filing a response to the petition."

Notwithstanding the petitioner's somewhat strained contention that the Court of Appeals differed from the National Labor Relations Board with respect to some of the facts involved, there is not a substantial question before the Court on the facts of the case. It is to be noted that there is a complete unanimity among the Trial Examiner of the Labor Board, the Labor Board itself and the Court of Appeals on the fact that there is no substantial dispute with respect to the facts of this matter (P.A. 4, 39; Pet. 35).

Petitioner also complains that the Court of Appeals considered evidence of events occurring more than six months prior to May 3, 1955, the date upon which charges were filed, in determining the purpose of the acts of the Petitioner which occurred within the six months period, and the reasonable consequences to be anticipated from those acts. Petitioner contends that Section 10(b) [29 U.S.C. Sec. 160(b)] of the Act prevents such consideration. In this the Petitioner is clearly in error as the prior decisions of the Courts and the National Labor Relations Board demonstrate.

The Board has consistently held, with the approval of the Courts, that "Section 10(b) enacts a statute of limitations and not a rule of evidence." The rule was well stated in *Axelson Mfg. Co.*, 88 N.L.R.B. 761, 766:

> "... Section 10(b) enacts a statute of limitations and not a rule of evidence. It forbids the issuance of complaints and, consequently, findings of violation of the statute in conduct not within the 6 months period. But it does not ... forbid the introduction of relevant evidence bearing on the issue as to whether a violation has occurred during the 6 months' period. Events obscure, ambiguous or even meaningless when viewed in isolation may, like the component parts of an equation, become clear, definitive, and informative when considered in relation to other action. Conduct, like lan-

guage, takes its meaning from the circumstances in which it occurs. Congress can scarcely have intended that the Board, in the performance of its duty to decide the validity of conduct within the 6 months' period, should ignore reliable, probative, and substantial evidence as to the meaning and nature of the conduct."[3]

The *Axelson* case was cited with approval by the U. S. Court of Appeals for the Third Circuit in *N. L. R. B. v. Luzerne Hide and Tallow Co.*, 188 F. 2d 439, 443. To the same effect see *N. L. R. B. v. General Shoe Corp.*, 192 F. 2d 504, 507; *N. L. R. B. v. National Shoes, Inc.*, 208 F. 2d 688, 691-2; *N. L. R. B. v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 653.

The decision of the Court of Appeals in *Superior Engraving Company, v. N. L. R. B.*, 183 F. 2d 783, cited by Petitioner, which was concerned with the application of Section 10(b) to unfair labor practices occurring prior to the effective date of the Act, itself clearly indicates that evidence antedating the filing of charges by more than six months can be used to prove a violation of the Act which occurred within the six months period. See 183 F. 2d 783 at 790-791.

It is clear, we submit, that the activities complained of in this matter were instigated, sponsored, aided and abetted by the Petitioner, its officers and agents, for the manifest benefit of Petitioner and its allies, all within the six months period preceding the filing of the charges. The course of action which occurred followed exactly the traditions of the Petitioner and the unions with which it is allied, conformed to the past practices and customs of the Petitioner

[3] In the *Axelson* case, the Labor Board considered evidence of a course of conduct going back for more than 15 years in order to assess an employer's responsibility for acts occurring within the 6 month period before the filing of charges.

and carried out the mandates of Petitioner's own Constitution and By-laws. It is, we submit, startling to suggest that Petitioner did not contemplate the course of action which ensued, from the very outset of its activities involved here, or, in particular, that Petitioner did not contemplate resort to strike action — the traditional union weapon — if persuasion and threats did not achieve its purposes.

As stated by the Court of Appeals below, ". . . it is enough that the Council instigated the course of events which proceeded, for the benefit of the Council, to the climax which was contemplated from the beginning, and that it took no action to disavow itself from the actions of a man who held the office of its president." See *I. B. E. W., Local 501 v. N. L. R. B.*, 181 F. 2d 34, 38-39; *Longshoremen's Union v. Juneau Spruce Corp.*, 189 F. 2d 177, 190; *Tompkins v. Sullivan*, 309 Mass. 496, 34 N.E. 2d 607, *cf. Local 562 United Association of Journeymen, etc.*, 107 N.L.R.B. 542.

The Court of Appeals was clearly correct in its determination of the legal consequences of the undisputed facts and its decision is neither in conflict with any decision of another U. S. Court of Appeals; nor presents a substantial issue for decision by the Court.

CONCLUSION

As stated by the General Counsel of the Labor Board the issue presented is whether on the particular facts of this case the Petitioner was responsible for the activities involved. The decision of the United States Court of Appeals for the Fourth Circuit holding the Petitioner responsible is correct. The Labor Board upon consideration has concluded that further judicial review of the matter is not warranted, and has decided to accept the remand. For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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